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IN THE

# Supreme Court of the United States

1971 Term

SUPREME COURT, U.S.
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No. 70-275

BERNARD LAFER,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### Preliminary Statement

The respondent, State of New Jersey, accepts the Statements of Opinion Below and Jurisdiction contained in the brief submitted by petitioner, except as supplemented or contradicted *infra*.

## Statement of Case

Petitioner, a member of the New Jersey Bar, was convicted under an indictment charging him with embezzlement contrary to the provisions of N.J.S.A. 2A:102-5. His conviction was subsequently affirmed by the New Jersey Superior Court, Appellate Division, and his petition for certification was thereafter denied by the New Jersey Supreme Court.

The State's proof at trial disclosed that petitioner had represented one Concepcion Rivera and her son, George, in a negligence action before the Superior Court, Law Division, and on July 26, 1967, had recovered a judgment in the sum of $10,000.00. The proceeds of the judgment were to be divided in accordance with an order entered by the Essex County Surrogate's Court which provided that George Rivera was to receive $6000.00. In addition, the sum of $1500.00 was to be given to Concepcion Rivera as the parent's share and petitioner was to receive $2500.00 as his attorney's fee.

On August 2, 1967, Mr. Lafer filed a petition in the Surrogate's Office reciting the circumstances surrounding the entry of the judgment and stating that the proceeds were free and clear of all legal liens and encumbrances. Letters of guardianship were thereafter issued to Concepcion Rivera and an order was entered by the Surrogate's Court requiring her to deposit $6000.00 which constituted George's share of the judgment, in the Robert Treat Savings and Loan Association. The order further provided that no withdrawals could be made without prior court approval and required that a certificate of deposit be filed with the Surrogate's Office. It is uncontroverted that the certificate of deposit was never filed with the Court and that the proceeds of the judgment were not

deposited in the Robert Treat Savings and Loan Association until August 22, 1969, when an account was opened in the name of Concepcion Rivera in the sum of $5400.00.

Further evidence was offered by the State concerning the manner in which the judgment was paid. The State's proofs disclosed that one check was issued by the American Mutual Insurance Co. and two drafts by the Fidelity and Casualty Co. The draft from American Mutual in the sum of $2500.00 was made payable to the order of Concepción Rivera as guardian and petitioner as trustee and was deposited in Mr. Lafer's trustee account on October 24, 1967. One draft, dated October 5, 1967, drawn on the account of Fidelity and Casualty Co., was in the sum of $4500.00 and was made payable to the order of Concepcion Rivera as guardian and petitioner as trustee. This draft was deposited in petitioner's trustee account on October 15, 1967. The third draft in the sum of $3000.00 was made payable to Concepcion Rivera and petitioner and was deposited in Mr. Lafer's trustee account on October 13, 1967.

It is undisputed that shortly before depositing the drafts representing the proceeds of the Rivera judgment, petitioner's trustee account contained a balance of $536.00. After depositing the two drafts issued by Fidelity and Casualty Co. in the sum of $7500.00 on October 13, 1967, petitioner's trustee account totaled only $6964.00. It can be thus inferred that several prior outstanding checks had cleared petitioner's account during the interim. Petitioner's bank statements, produced by the State and introduced into evidence, indicated that Mr. Lafer's account was overdrawn on numerous occasions subsequent to the deposit of the proceeds of the Rivera judgment. On April 10, 1968, for example, there was a minus balance of $687.74 On April 24, 1968, the account was overdrawn in the

sum of $1538.10. On May 9, 1968, overdrafts totaled more than $2234.00.

James R. Giuliano, the Assignment Judge in Essex County, testified that on June 2, 1969, he called petitioner to his chambers for a conference and advised him that he had received a complaint from Mrs. Rivera that she had not received any part of the settlement. Judge Giuliano then asked petitioner whether he had any explanation as to why Mrs. Rivera had not received the proceeds of the settlement. Petitioner did not reply to the Judge's query and offered no reason for the apparent violation of the law. Petitioner was then directed by Judge Giuliano to tender a certified check to Mrs. Rivera no later than June 3, 1969. At the conclusion of Judge Giuliano's testimony, the trial court instructed the jury not to draw any inference against petitioner merely because he had been called before the Assignment Judge on the basis of alleged violations of legal ethics.

The State then introduced into evidence a check dated June 10, 1969, drawn on petitioner's trustee account and made payable to the order of Concepcion Rivera as guardian. The check was in the sum of $6224.60 and was certified on June 11, 1969.

At the conclusion of the State's case, petitioner moved for a judgment of acquittal. After a thorough review of the evidence and extended argument by counsel on both sides, the trial court denied petitioner's motion, stating that a *prima facie* case of embezzlement had been presented.

Petitioner took the stand in his own behalf and testified that he had been a member of the bar for approximately fifteen years. He did not dispute the fact that he had received three drafts from the two insurance compan-

ies involved and had not deposited the proceeds of the judgment in the Robert Treat Savings and Loan Association as required by the order of the Surrogate's Court. According to his testimony, this omission was the product of an agreement with Mrs. Rivera, whereby he was given the right to use the money for his own purposes at an interest rate of five per cent. It is undisputed that the money was used to pay his mortgage and other personal debts.

Petitioner further testified that it was his belief that Mrs. Rivera was a welfare recipient and that the Essex County Welfare Board possessed a lien on the proceeds of the judgment. He admitted, however, that he never took steps to determine whether a lien on the proceeds of the judgment, in fact, existed. Petitioner further admitted that he had prepared a petition which was filed in the Essex County Surrogate's Court stating that the proceeds of the judgment were free and clear of all liens. Additionally, petitioner never issued a receipt to Concepcion Rivera for the money that he had allegedly borrowed and never advised Judge Giuliano concerning his alleged agreement with his client or about the possibility that a lien existed on the proceeds of the judgment.

The State produced Abe R. Brotspies as a rebuttal witness. Mr. Brotspies testified that he was employed by the Essex County Welfare Board as a supervisor. According to his testimony, Concepcion Rivera first applied for welfare on December 7, 1967 and received her first check on January 1, 1968. He further stated that the Welfare Board possessed no right to be reimbursed from the proceeds of the judgment absent an express agreement providing for the same. Since no such agreement existed with respect to Concepcion Rivera, there was no lien on the judgment proceeds. Contrary to petitioner's testi-

mony, Mr. Brotspies stated he had never spoken to Mr. Lafer before October 31, 1969. On that occasion petitioner called him on the telephone and stated, "I've got some money for you. Aren't you interested in getting some money?" Petitioner then informed Mr. Brotspies of the facts surrounding the Rivera judgment. Petitioner called Mr. Brotspies repeatedly thereafter always asking the same question.

At the conclusion of the case, the trial court instructed the jury with respect to the principles of law pertaining to the crime of embezzlement. The jury thereafter returned a verdict of guilty and sentence was imposed.

## *ARGUMENT*

### POINT I

**Due process as guaranteed by the Fifth and Fourteenth Amendments was not denied petitioner by the admissions of testimony relating to his confrontation with Judge Giuliano.**

Defense counsel first contends that the court below erred in permitting Judge Giuliano to testify as to the circumstances surrounding his conference with petitioner on June 2, 1969. At that conference, Judge Giuliano informed petitioner that Mrs. Rivera had come to his office that morning in reference to her son's case and had advised him that she had received no part of the settlement. Judge Giuliano then ordered petitioner to issue a certified check to Mrs. Rivera and further advised him of his intention to send the matter to the Ethics Committee. When the Assignment Judge asked petitioner for an explanation as to his failure to disburse the judgment proceeds, Mr. Lafer chose to remain silent.

At trial, defense counsel objected to Judge Giuliano's testimony relating to his confrontation with petitioner. More specifically, it was argued that the proferred testimony was "unduly prejudicial."

The trial court was not persuaded, however, and denied defense counsel's objection. Immediately thereafter, the court instructed the jury "not to draw any inferences against defendant simply because a judge . . . stated he was sending the matter to the Ethics Committee." The Court went on to state that the alleged ethics violation did not "in any way, shape or form imply guilt on the part of the defendant."

Petitioner argues that the admission of Judge Giuliano's testimony constituted a violation of this Court's decision in *Miranda* v. *Arizona,* 387 U. S. 486 (1966). More specifically, it is contended that the application of the doctrine of assenting silence constitutes a deprivation of due process of law under the Fifth and Fourteenth Amendments.

Petitioner's argument is totally devoid of merit. There is no question but that the doctrine of assenting silence has retained its vitality when applied to non-custodial interrogations where the accused does not possess the right to remain silent. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not present. Moreover, it is abundantly clear that the privilege against self-incrimination is inapplicable with respect to interrogations conducted by private persons. See for example, *State* v. *Little,* 201 Kan. 94, 439 P. 2d 387 (Sup. Ct. 1968); *People* v. *Frank,* 52 Misc. 2d 266, 275 N. Y. S. 2d 570 (S. Ct. 1966); *Shaumburg* v. *State,* 83 Nev. 372, 432 P. 2d 500 (1967); *cf. United States* v. *Stonehill,* 254 F. Supp. 1003 (S. D. N. Y. 1966); *People* v. *Ran-*

*dazzo,* 220 Cal. App. 2d 768, 34 Cali. Rptr. 65 (1963); *Sackler* v. *Sackler,* 255 N. Y. S. 2d 83, 203 N. E. 2d 481 (1964). This being the case, silence in the face of accusatory questions propounded by persons other than law enforcement personnel is not protected by the Fifth Amendment.

Petitioner's reliance on *State* v. *Garcia,* 83 N. J. Super. 345 (App. Div. 1964) is clearly misplaced. *Garcia, supra,* involved the admission of evidence relating to a suspect's silence in the face of accusatory statements made while in police custody. *Id.* at 357. As noted by the Supreme Court of New Jersey in *State* v. *Ripa,* 45 N. J. 199, 203-204 (1965), when a person is in police custody:

> "(T)he right of a suspect to remain silent is a conspicuous and a likely explanation of his silence. That right could be nullified if a jury were permitted to infer the accused was silent because he acknowledged the truth of the accusation. Hence, our cases have quite clearly revealed dissatisfaction with the concept in that setting."

The Court went on to state that its decision was not intended to abrogate the doctrine of tacit admissions but that it still had efficacy with respect to non-custodial interrogations. *Id.* at 203-204. Also see *State* v. *Garcia, supra* at 357.

As noted, the courts of New Jersey have placed severe restrictions on the applicability of the doctrine of assenting silence. So restricted, the doctrine remains a valuable evidentiary principle in this State. That a state is free to adopt and formulate its own rules of evidence has recently been reaffirmed by the Court in *Dutton* v. *Evans,* —— U. S. —— (1970). It is, therefore, abundantly clear that petitioner's present application is without basis.

Even asuming, however, that non-custodial interrogations conducted by private persons fall within the ambit of *Miranda, supra,* constitutional principles were not violated in the instant case. The State's evidence concerning petitioner's silence in the face of accusatory remarks made by the Assignment Judge can in no way be considered a substantive admission of guilt or a confession protected by *Miranda.* To the contrary, this evidence was offered for a wholly different purpose. Judge Giuliano's testimony was admitted to prove that the tender of monies to Mrs. Rivera on June 10, 1969 was made by petitioner in response to a judicial order. Absent this testimony, the jury could have been misled into believing that petitioner satisfied his obligation to his client of his own free will. Such was not the case, however.

Any danger that the jury misconstrued the probative value and effect of this evidence was clearly obviated by the court's cautionary instruction on at least two occasions during the course of trial. It is fairly to be presumed that the jury complied with the trial court's admonition.

Equally unavailing is petitioner's claim that the prosecutor's comments made during his summation constituted error of constitutional dimension. While it is true that the prosecutor alluded to petitioner's silence in the face of Judge Giuliano's accusatory remarks, these comments were made to affect Mr. Lafer's credibility. It is to be noted in this regard that petitioner voluntarily took the stand in his own defense and claimed that it was his belief that the Essex County Welfare Board possessed a lien on the proceeds of the judgment. He further testified that he refused to disburse the judgment proceeds because he feared that the Welfare Board had some rights to

them. Despite this alleged belief, petitioner offered no explanation to the Assignment Judge for his failure to disburse the funds as required by the order of the Surrogate's Court. The prosecutor had every right to comment upon petitioner's silence in order to rebut Mr. Lafer's imaginative explanation of his conduct offered at trial.

This Court has only recently held that a statement made by a suspect during a custodial interrogation by law enforcement officers in violation of *Miranda, supra,* may nevertheless be introduced into evidence by the State on rebuttal to affect the defendant's credibility. See *Harris* v. *New York,* —— U. S. —— (1971). Here, petitioner took the stand and offered an explanation of his conduct that had not been previously to Judge Giuliano. The prosecutor's comments constituted an attack on petitioner's credibility. This being the case, even if *Miranda* has applicability to non-custodial interrogations conducted by private persons, petitioner's rights were in no way violated. His petition must therefore, be denied.

## POINT II

**The admission of Judge Giuliano's testimony was neither prejudicial nor a denial of petitioner's right to a fair trial.**

Petitioner argues that the admission of Judge Giuliano's testimony as to his private conversation with Mr. Lafer was highly prejudicial and constituted a denial of due process of law.

Again, petitioner's claim is without merit. As previously noted, the Assignment Judge's testimony was of-

fered by the State to prove that the tender of monies to Mrs. Rivera on June 10, 1969 was not voluntarily made but was in response to the Assignment Judge's specific order and threat of sanctions. Absent this testimony, the jury could well have concluded that petitioner voluntarily fulfilled his obligation to his client. It was incumbent upon the State to prevent such a miscarriage of justice.

Petitioner claims that the admission of the Assignment Judge's testimony constitutes a violation of Rule 4 of the *New Jersey Rules of Evidence* which provides the pertinent part as follows:

> "The judge may in his discretion exclude evidence if he finds that probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time, or (b) create danger of undue prejudice or of confusing the issues or of misleading the jury."

In pursuing his argument, petitioner ignores the fact that the trial judge cautioned the jury with respect to the probative value of the evidence on three separate occasions. Immediately following the reception of the evidence, the trial judge stated to the jury:

> "Ladies and gentlemen, I will inform you now and I will mention this again in my charge, that you are not to draw any inferences against the defendant simply because a judge of this court stated that he was sending the matter to the Ethics Committee and in turn to the Prosecutor. That does not in any way, shape or form imply guilt on the part of the defendant. It was admitted solely for the purpose of a presentation of what transpired and what may have then come after."

Substantially the same cautionary instruction was repeated in the trial court's main charge. Finally, by way of supplement to the principal charge and at the specific request of defense counsel, the trial judge added:

> "Ladies and gentlemen of the jury, you will bear in mind, of course, that the charge in this case is the criminal charge of embezzlement. This defendant is not being tried on the question of whether he is a good and competent lawyer, or a poor or incompetent lawyer, he is not being tried on the question of whether he followed or did not follow ethical standards of a lawyer."

This curative instruction, fortified by repetition in the charge, neutralized any unfair prejudice which might have otherwise existed. Again, it is fairly to be presumed that the jury was capable of following the trial court's instructions.

Petitioner has attempted to couch his present claim in constitutional language in order to seek review by this Court. For example, he has seen fit to cite *Bruton* v. *United States*, 391 U. S. 123 (1967) in support of his argument. *Bruton* involved the admission of a co-defendant's confession and is totally inapposite to the factual pattern in the instant case. There is not a hint of an argument that cross-examination of any witness was denied or impaired in the case *sub judice*.

The admission of the Assignment Judge's testimony was within the discretion conferred on the trial court under Rule 4 of the *New Jersey Rules of Evidence* and does not constitute a question of constitutional moment.

An examination of the record below clearly reveals that petitioner was afforded a fair trial conducted in an impartial manner. His present claim of prejudice constitutes pure fantasy and is belied by the record below.

## POINT III

**Petitioner was supplied with a complete Grand Jury transcript consistent with the New Jersey Rules of Practice and was not deprived of his rights under the Sixth and Fourteenth Amendments.**

Petitioner next contends that the failure of the State to provide him with a complete copy of the Grand Jury transcript constituted a denial of his rights under the Sixth and Fourteenth Amendments.

Again, the argument raised is not of constitutional dimension. As noted by the trial court, the Grand Jury transcript was available to defense counsel on December 12, 1969, four days prior to trial. The transcript consisted of five typewritten pages capable of being read in a very short period of time. The delay in presenting the transcript to petitioner was caused by the stenographer's absence from the State. The brevity of the transcript clearly belies petitioner's present claim of prejudice.

Equally unavailing is petitioner's argument that significant portions of the Grand Jury minutes were omitted. While it is true that Mrs. Rivera's letter was lost, it was read into the record by the Prosecutor during the Grand Jury proceedings. That petitioner was not prejudiced cannot seriously be disputed since the letter was exculpatory in nature and was used by defense counsel at trial. It is difficult to discern in what manner petitioner was prejudiced by the inadvertent failure of the State to produce the letter at or before trial. Surely, the issue raised here is not of public importance and does not merit this Court's time and attention.

## POINT IV

**The failure of the State to call Mrs. Rivera at trial in no way prejudiced petitioner's case.**

Petitioner next contends that the Prosecutor's treatment of the complaining witness, Mrs. Rivera, effectively deprived him of the benefit of her testimony at trial. More specifically, it is contended that the conduct of the State in subpoenaing Mrs. Rivera and in failing to have her testify so coerced her so as to prevent the defense from calling her as its own witness.

The record below does not reveal any conduct on the part of the State which in any sense may be interpreted as having the effect of preventing the defense from calling Mrs. Rivera as its own witness at trial. The right of the State to subpoena Mrs. Rivera and to confer with her prior to trial cannot seriously be questioned. Moreover, it was clearly not incumbent upon the State to produce at trial a witness for whose credibility it could in no way vouch and who had expressed a wish to assist the petitioner.

Contrary to petitioner's assertion contained in his brief, Mrs. Rivera's decision to refuse to cooperate with the defense was not caused by the State. In an affidavit submitted after the trial, Mrs. Rivera stated that she had promised to call Mr. Lafer at 1:30 P.M. on December 18, 1969, in the event he wished her to testify in his behalf. Nevertheless, Mrs. Rivera deliberately failed to call defense counsel because she was "afraid she might be implicated in a fraud by failing to notify the Welfare Board of the settlement" and "afraid of losing these monies" if she were to testify.

Nowhere in the affidavit does Mrs. Rivera state that she would not have testified favorably for the defense if called as a witness. In fact, the record below belies the contention that Mrs. Rivera was not available to the defense. At one point during the trial, the defense represented that it intended to call Mr. Rivera as its witness. In spite of this express representation petitioner later elected not to call her although the Prosecutor stated she could be produced very quickly. Defense counsel at that time stated, " I am not putting in such a request." The State submits that the Prosecutor fulfilled his duty and was under no obligation to produce Mrs. Rivera at trial. The petitioner was not prejudiced due to the fact that she was at all times available to the defense, which finally elected not to call her as a witness. See *State* v. *Clawans,* 38 N. J. 162, 173 (1962).

In summary, the record below does not support petitioner's present claim. The State did not actively conceal exculpatory evidence, but decided not to call Mrs. Rivera as a part of its case in chief. A prosecutor may sensibly decide for various reasons not to present all evidence in his possession concerning the guilt of the accused. See *State* v. *Murphy,* 36 N. J. 172, 178 (1961) reversed on other grounds 378 U. S. 52 (1964). In any event, petitioner's defense was not prejudiced by any conduct on the part of the State.

## CONCLUSION

None of the arguments advanced by petitioner in this application for a Writ of Certiorari is of constitutional dimension. Nor are the questions raised of public importance. In fact, petitioner was afforded a fair and impartial trial. For the foregoing reasons, the respondent,

State of New Jersey, submits that a petition for a Writ of Certiorari to the Superior Court, Appellate Division should not be granted.

Respectfully submitted,

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